IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD OF HEALTH OF THE CITY OF CHICAGO, DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,
Petitioners,

vs.

FIELDCREST DAIRIES, INC.,
Respondent.

REPLY BRIEF OF PETITIONERS.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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INTRODUCTORY COMMENTS.

Before discussing the separate points made in the respondent's brief, we make the following preliminary comments on a number of matters affecting the entire case.

(*a*) *The State of Illinois has not manifested a public policy in favor of paper milk containers.*

Throughout its brief respondent speaks of the use of paper milk containers as having been "approved" or "expressly sanctioned" by the Illinois legislature (brief, pp. 15,

31, 35, 47, 56, 77, 104, 114) and of the Illinois legislature as having found paper milk containers to be "wholesome" and "safe and sanitary," (brief, pp. 56, 58, 104). The respondent exaggerates the effect of the action of the legislature in passing the Milk Pasteurization Plant Act of 1939.

Before 1939 there was nothing in the Illinois statutes about paper milk containers. They were not forbidden; they were not permitted by express language; they were not regulated. So far as the State of Illinois was concerned, paper milk containers could thus be used without hindrance. In the 1939 statute all that the legislature did as to paper milk containers was to provide in item 10 of section 15 that "single-service containers . . . shall be manufactured and transported in a sanitary manner" (ch. 56½, sec. 129, Ill. Rev. Stat. 1941). While before the statute there was no restriction, the statute imposed a restriction by requiring that, if single-service containers are used, they shall be manufactured and transported in a sanitary manner. Certainly when a state requires for the first time that shoddy used in making blankets must be subjected to bactericidal treatment, when there has been no prior regulation, it does not, by imposing the restriction, manifest a public policy in favor of shoddy blankets. Similarly when a state for the first time regulates the use of intoxicating liquor theretofore unrestricted it does not thereby manifest a public policy in favor of it. The public policy of the 1939 Act which is pertinent here is that which expresses the legislature's determination of the appropriate distribution of governmental power between state and municipality. That policy clearly views regulation by the state, not as an ultimate exercise of the full scope of the police power, but as the fixing of *minimum* requirements beyond which municipal regulation is authorized and contemplated.

(b) There is no controversy in this case between the State of Illinois and the City of Chicago.

Much of the discussion in the respondent's brief (see particularly pp. 7-9) is intended to create the impression that there is a controversy here between the "sovereign" state of Illinois and "its instrumentality," the city of Chicago. The brief even speaks of the City of Chicago as "defeating the objectives" of the State of Illinois in passing the Milk Pasteurization Act of 1939. (Of course the provision in that statute that single service containers shall be sanitary does not mean that one of the objectives of the act was to permit the use of single service containers.) The policy of the State of Illinois is indicated by the statute. In the statute the voice of the sovereign state said that the powers of municipalities were not impaired or abridged. The power of the city to prohibit paper containers is thus in accord with the expressed wish of the state. In saying "less harm can result from a decision in favor of the sovereign than one in favor of its instrumentality," the respondent's brief overlooks the fact that the decision of the Circuit Court of Appeals that the city had no power is contrary to the expressed wish of the sovereign stated in the saving clause in the statute.

Respondent's brief says (p. 9) of the decision by the Circuit Court of Appeals:

> "It actually reenforces and protects the power of the state from impairment by judicial implication from doubtful language contained in an ambiguous statute."

There is no question here of protecting "the power of the state." The city is an arm of the state government. The state itself in clear language has delegated the power to the

city. In fact the Circuit Court of Appeals, in disregarding the language of the saving clause, has impaired the power of the state to distribute powers among subordinate bodies. While terming the saving clause "doubtful" and "ambiguous," the respondent's brief does not attempt to answer the analysis of its clear language in the petitioners' brief (pp. 19-21).

The respondent argues (p. 44) that "'chaos" in regulation will result unless it is held "that the city's power is withdrawn by implication in the field actually occupied by the State of Illinois." And it is said that this would lead to "an unseemly conflict of jurisdiction between the state and the city." The legislature may withdraw the city's power at any time it sees fit. There is no conflict of jurisdiction where the state has expressly conferred the power on the city. And chaos will not result. In the case of paper milk containers, there is nothing chaotic about a city forbidding a commodity to be sold in a container which is not forbidden in other parts of the state.

(c) *Further explanation of the application of Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941).

The respondent says (p. 4) that the petitioners' brief (pp. 31-34) shows that there is nothing in the *Pullman Company* case "which should preclude a decision of the question of local law by a federal court." That is not the position of petitioners. As a local governmental body the City of Chicago is of course interested in the doctrine stated in that case by Mr. Justice Frankfurter (p. 501): "a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state govern-

ments' and for the smooth working of the federal judiciary."

But, as noted in the petitioners' brief (pp. 32-33), it would be a misfortune from the city's standpoint if the present litigation were not terminated by the decision of this court. The holding of the Circuit Court of Appeals on the construction of the 1939 statute has clouded the powers of Illinois municipalities to such an extent that it would be an injustice to the city if the holding remained operative during the long delay that would ensue from the remandment of the case to the trial court to await a determination of the question in the state courts. Moreover, as pointed out in the petitioners' brief, the case was not instituted in the federal court for the purpose of having the local question determined; and it is not difficult to forecast the Illinois law on the question of the city's power under the clear language of the 1939 statute, particularly in view of the recent decision of the Illinois Supreme Court in *City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 39 N. E. 2d 26 (1941), [the decision became final on January 15, 1942, after the filing of the petitioners' brief in this case]. Furthermore, the opinion of the Circuit Court of Appeals (R. 1794) discussed the reasonableness of the ordinance in such a way as to indicate clearly that the ordinance was unconstitutional. The importance of the constitutional validity of public health regulations seems clearly to call for a review by this court of the dictum of the Circuit Court of Appeals on the constitutional question.

Strangely enough, the respondent in its brief takes a position that seems to call for the application of the *Pullman Company* case here. If the spurious controversy between the State of Illinois and the City of Chicago fabri-

cated by the respondent had any basis in fact, this case would certainly be one that should be determined in the state courts.

Nevertheless, for the reasons noted in the petitioners' original brief, we continue to urge this court to make a final disposition of the questions presented.

The respondent argues (pp. 5-6) that the issues presented should be summarily determined by a *per curiam* opinion to the effect that the decision of the Circuit Court of Appeals should be affirmed because a question of local law has been passed upon by federal judges on the spot. This argument is based on the recent decision by this court in *MacGregor* v. *State Mutual Life Insurance Co.*, decided February 16, 1942, No. 179, October Term, 1941. That case is entirely different from the case at bar. It did not present a question of public law. There federal jurisdiction was based solely on diversity of citizenship. Here federal jurisdiction is based upon the existence of a federal constitutional question as well as on diversity of citizenship. And there a constitutional question was not discussed by the Circuit Court of Appeals, as it was by the Circuit of Appeals in the case at bar (R. 1794).

(d) Respondent's use of the term "paper milk bottles" and other assumptions in the respondent's brief.

Throughout the respondent's brief there is a studied use of the term "paper milk bottles." One of the issues in this case is whether or not a paper container *is* a "milk bottle." The Circuit Court of Appeals held that it is not. The repetition of "paper milk bottles" seems to be employed by the respondent on the theory that, by saying it often enough, it could induce a belief that its paper containers are "milk bottles." Similar devices of the propa-

gandist, "puffing" paper milk containers in the manner of an advertiser, are used throughout the respondent's brief.

For example, the respondent says (p. 64) that the trial court's holding that paper containers should be permitted was a holding that the law "should adopt the best scientific thought of the age," as if in some way the city's prohibition of paper containers to safeguard the city's milk supply was in conflict with modern sanitary standards. The record does not show this, for as the master found (R. 1734) the testimony of the *respondent's own witnesses* indicated that "the City Council could reasonably have concluded that prohibition of paper containers was necessary and appropriate to protect the purity and wholesomeness of milk." Similar assumptions in the respondent's brief are that the use of paper milk containers "promotes public health and proper sanitation" (brief, pp. 63-64); and that the requirement of the Illinois legislature that paper containers be manufactured and transported in a sanitary manner means that the City of Chicago, in forbidding their use, defeats "the liberal and progressive attitude of the state" (brief, p. 9). Throughout the respondent's brief are many statements on which there is no evidence whatever, some dealing with events that have obviously occurred since the trial. The respondent even goes to the extent of arguing that "considerations of present national policy in conserving automobile tires and man power are promoted by paper milk bottles" (brief, pp. 119-120). Milk is said to be sold in paper containers to army camps throughout the country "without a suggestion of ill effect" (brief, p. 105). It is said there has been no harm from the use of paper containers in Chicago sold under the protection of the injunction issued by the trial court in the case at bar (brief, p. 67).

These and similar statements in the respondent's brief deal with matters for the sole determination of the legislative body. Since they are outside of the record, they are not answered further in this reply brief, however weighty the countervailing considerations may be.

I.

The Illinois Milk Pasteurization Plant Act of 1939 did not deprive the city of power to pass the ordinance.

(Reply to respondent's Point I, brief, pp. 4-51).

The respondent's brief seems to lose sight of the fact that the question presented is one of statutory construction: did the Illinois legislature, in providing that when paper milk containers are used they must be manufactured and transported in a sanitary manner, thereby impliedly repeal the provision in the 1872 Cities and Villages Act giving the city the power to regulate the sale of milk? Repeals by implication are not favored.

Outstanding is the failure of the respondent to deny that the holding of the lower court means that the city's power under the 1939 statute is less than it was before. The holding means that the city's power *was* impaired by the statute, although the saving clause in section 19 of the statute says expressly, "*Nothing in this act shall impair or abridge the power of any city . . . to regulate . . . the . . . distribution of . . . milk . . .*". Moreover:

(a) The respondent does not discuss the meaning of the particular words in the saving clause. These words state emphatically and unmistakably that the power of the city under the 1939 statute is the same as it was under the 1872 statute (except for the inapplicable proviso). See petitioners' brief, pp. 19-21.

(b) The respondent does not answer the petitioners' contention (pp. 18-19) that, since the saving clause and

the title of the statute are in identical terms, the saving clause is as broad as language could make it and, whatever aspect of the milk industry is regulated by the statute, the legislature has said expressly that the city retains its power to regulate.

(c) The respondent does not answer the petitioners' contention (brief, p. 19) that the proviso in the saving clause evidences a legislative intention that only matters within the proviso are excepted from the broad operation of the saving clause under the rule, *expressio unius est exclusio alterius*, and consequently the power to forbid the use of paper milk containers is retained.

(d) The respondent does not answer the petitioners' contention (brief, pp. 24-25) that the Circuit Court of Appeals found that the ordinance conflicts, not with the entire statute, but with a part of it; and that the court's reasoning was basically fallacious in considering the effect of a part of the statute on the city's power *before* it considered the meaning of the clause that preserves the city's power. In fact the respondent commits the same error: *before* considering the meaning of the saving clause (respondent's brief, p. 34 *et seq.*), the respondent (brief, pp. 10-33) argues and concludes that the ordinance conflicts with the statute. There is no conflict between the ordinance and the statute when the statute is considered as a whole.

Inconsistencies in Respondent's Argument.

In arguing that the saving clause is not effective here, it was obviously necessary for the respondent and the Circuit Court of Appeals to attempt to show what the saving clause does mean. This attempt has involved both the lower court and the respondent in a maze of inconsistencies. The respondent argues first (brief, p. 26) that in the 1939 statute

> "the utmost care is taken to include *all important details* with reference to the sale and distribution, as well as the pasteurization, of milk, and to give the State Director of Health power to supplement the requirements."

And again the 1939 act is said to regulate "in detail *the entire field of milk distribution*" (brief, p. 34). Then, when the respondent comes to discussing the saving clause, the brief says (p. 36) that the saving clause leaves the city's power unimpaired "as to all those numerous matters not governed by the statute" and that the city's power is preserved "on those subjects not occupied by the state system of supervision" (p. 48).

Thus, while the statute is said to occupy the entire field, the saving clause is said to preserve some of the city's power. Yet the brief also says (p. 44) that the statute withdraws the city's power "in the field actually occupied by the state." And the statute is said to show no intention to permit cities "to occupy the same field of regulation as the state" (p. 33). Clearly there is nothing left for the city to regulate if the 1939 statute covers "all important details with reference to the sale and distribution, as well as the pasteurization, of milk." Moreover, the respondent's interpretation of the saving clause conflicts with that of the majority opinion of the Circuit Court of Appeals, which said:

> "The purpose of the saving clause, in our judgment, was to preserve in the city the unquestioned right to continue *in a field which had been entered by the state, and in which, thereafter, each should have co-extensive power and authority.*" (R. 1793; italics added.)

And this statement in the opinion is inconsistent with the court's holding that the 1939 statute has deprived the city of power to forbid the use of paper containers, (see petitioners' brief, p. 29).

Similarly, the respondent is inconsistent in arguing (pp. 50-51) that under the 1939 statute the city may *regulate* paper containers although it may not *prohibit* their use.

This also was said in the majority opinion of the Circuit Court of Appeals. The basis of the contention that the city may not prohibit their use is that the state has entered the field by providing that paper containers must be manufactured and transported in a sanitary manner. The same argument strikes down the power of the city to regulate. For example, if the city should require that the paraffin bath in which the container is dipped must have a certain temperature which happened to be higher than that required by the state, the city's regulation would be in the field occupied by the state. And the argument of state approval would also apply, since the container would meet the state requirements as to the temperature of the paraffin bath and the city would be prohibiting what the state permitted.

Similarity of Saving Clause in 1941 Grade A Milk Law.

Respondent concedes (brief, p. 32) that the language of the saving clause contained in the 1941 Grade A Milk Law is effective to express the legislative intention that municipalities retain the power to enforce more rigid sanitary requirements than are provided by statute. This concession makes it appropriate to point out the origin of the difference in language between the saving clauses in the two statutes. The saving clauses in the two statutes, although phrased in different words, express an identical legislative purpose.

The Grade A Milk Law and the Milk Pasteurization Law were companion pieces of legislation introduced in the 1939 session of the Illinois General Assembly as Senate Bills 287 and 288, respectively. Both bills were passed by the General Assembly and approved by the governor but the saving clause which had been added to S. B. 287 (the Grade

A Milk Law) was omitted from the engrossed bill as signed by the governor. The omission was not immediately noted and the bill, without the saving clause, was printed in the 1939 Session Laws of Illinois (Laws of Ill. 1939, pp. 667-670). On January 26, 1940 the attorney general issued an opinion holding that the act as it appeared in the Session Laws of 1939 was void because of the omission of the saving clause.*

On August 4, 1939 (apparently before the omission of the saving clause had been called to his attention) the Director of the State Department of Public Health promulgated his "minimum requirements" under the Act and published the Act and the minimum requirements promulgated by the Department in pamphlet form. ("Grade A Milk Law and Minimum Requirements for Interpretation and Enforcement Published by Illinois Department of Public Health," printed by the authority of the State of Illinois, 1939). As published, the statute and the minimum requirements were preceded by an explanatory "introduction" which is so pertinent to the question of legislative construc-

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*The story appears in the opinion of the attorney general addressed to the director of the Department of Public Health, holding the 1939 Grade A Milk Law invalid because of the omission of the saving clause from the bill as signed by the governor (Illinois Attorney General's Report and Opinions, 1940, pp. 69-71). The legislative history of the 1939 legislation appears in Senate Journal Illinois 1939, pp. 250, 357-8, 429, 439-40, 461, 690, 1421-2; House Journal Illinois 1939, pp. 934, 964, 1011, 1019, 1155, 1246, 1368, 1532, 1546, 1589, 1636, 1796-7, 1872, 1890.

tion involved in this case that its opening paragraphs are set forth in a footnote.*

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*"This 'Grade A Milk' Act does not make the grading or grade labeling of milk compulsory. The use of the grade A label is entirely voluntary with each dairyman or distributor. The Act does control the use of the Grade A label to the extent of setting up standards or minimum requirements for the production, handling, and processing of milk so labeled. It empowers the Director of the Department of Public Health to enforce such minimum requirements and it provides penalties for violations.

"The Act establishes State-wide standards or minimum requirements and definitions of "Grade A Milk" and "Grade A Milk Products." It prohibits the misuse of the Grade A label, and was enacted to protect the consumer of milk from the dairyman or distributor who would label his product as Grade A without regard for the sanitary conditions of its production, handling, processing and distribution.

"In order to protect the health of consumers, many municipalities in the State have adopted milk sanitation control ordinances recommended by the Department. These ordinances provide for the labeling of milk as "Grade A", when the provisions of the ordinances have been complied with as determined by local sanitarians. This Act goes further and makes it possible for a dairyman or distributor located where there is no local sanitary supervision of milk supplies, to produce and distribute milk as "Grade A Milk", when the provisions of the law have been complied with as may be determined by the Department of Public Health, after inspection of the premises and investigation of methods. Continued use of the label depends on continued operation of the dairy or milk plant in conformity with the law and requirements. * * * "Grade A Pasteurized Milk" means the same quality of milk as that identified with the Grade A raw label but which has the added protection of pasteurization. The fact that the Act legally recognizes raw milk does not relieve health authorities of the responsibility of advocating pasteurized milk as the only assuredly safe milk supply.

"In formulating the minimum requirements authorized in Section 16 of the Act, for the interpretation and enforcement of the Act, the form and contents have been patterned as near as practicable to the Grade A ordinances in force in municipalities of this State and throughout the United States. *This Act will in no way conflict with existing municipal grading ordinances. Municipalities are empowered to enact and enforce more rigid sanitary requirements than are provided in the Act.*"

The identical language appears in the introduction to the pamphlet publication of the 1941 Grade A Milk Law which was published after the reenactment of the statute in 1941. (Grade A Milk Law and Minimum Requirements for Interpretation and Enforcement. Educational Health Circular No. 135.) No introduction was published in connection with the pamphlet publication of the Milk Pasteurization Law.

Reference to the legislative history of the two statutes shows that the saving clauses originated by amendment in the house of representatives on successive days (S. B. 297, June 27, 1939, H. J. Ill. 1939, p. 1589; S. B. 288, June 26, 1939, H. J. Ill. 1939, p. 1532).

The 1941 Grade A Milk Law is a reenactment of the 1939 act. The language of the saving clause which respondent concedes to be effective to preserve municipal power originated in 1939, one day after the language of the saving clause involved in this case. Omitting the portions of the two saving clauses which repeat the language of the titles of the respective acts, they read as follows:

The Grade A Milk Law:

> "Nothing in this Act shall impair or abridge the power of any city, village or incorporated town to regulate * * * provided the minimum requirements under this Act are observed."

The Milk Plant Pasteurization Law:

> "Nothing in this Act shall impair or abridge the power of any city, village or incorporated town to regulate * * * provided that such regulation not permit any person to violate any of the provisions of this Act."

The language of the two saving clauses will not support a difference in interpretation. Any violation of the state law is a failure to observe the minimum requirements of the state law—and any failure to observe the minimum requirements of the state law is a violation of the state law. Of course meticulous perfection might require that if the intention is identical, identical language should be used. But the goal of pedantic perfection vanishes in the reality of the legislative atmosphere. To say that a precise sense of orderliness would indicate identity of language is

not at all to say that different words may not be used to express a single thought.

To say that these two saving clauses originating on successive days express entirely different notions about a matter so fundamental as the distribution of important public health powers between a state and its municipalities, more must be required than a mere difference in choice of words. The primary object of the Milk Pasteurization Law is to regulate conditions in the pasteurization plant. The primary purpose of the Grade A Milk Law is to regulate conditions upon the dairy farm. So far as the City of Chicago is concerned, the two acts cover the entire scope of municipal regulation pertaining to milk.*

If there can exist any reason why the state should be considered to have preempted the field of permissible regulation with respect to pasteurization plants, while municipal and state regulation are permitted to exist side by side in the field of regulation of the dairy farm, that reason does not occur to us and has not been suggested in this case. Certainly the use of the words "provided that such regulation not permit any person to violate any of the provisions of this Act" contrasted with the words "provided the minimum requirements under this Act are observed" does not accomplish this result.

Importance of Recent Case of City of Geneseo v. *Illinois Northern Utilities Co.*

The respondent cites two of the many cases involving the question of whether or not the Illinois Public Utilities Act had repealed by implication powers theretofore granted to Illinois municipalities. *Village of Atwood* v.

*This is true because under the Chicago Milk Ordinance only grade A milk is permitted to be sold (R. 45).

Cincinnati, etc. R. Co., 316 Ill. 425 (1925), and *Northern Trust Co.* v. *Chicago Railways Co.*, 318 Ill. 402 (1925). The language of the opinions in these two cases has been somewhat restricted by a case just decided by the Illinois Supreme Court.

This latest case is *City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Ill. 506, 39 N. E. 2d 26 (1941) [the decision did not become final until the denial of a motion to reconsider on January 15, 1942, which was after the petitioners filed their brief in the case at bar.] In that case article 5 of the 1872 Cities and Villages Act granted cities the power to regulate the use of streets. These provisions had been held by Illinois courts to authorize cities and villages "to regulate and control the use of their streets and this included the right to grant to or to withhold that use from utilities." The Illinois Public Utilities Act of 1921 (sec. 1 *et seq.*, ch 111-2/3, Ill. Rev. Stat. 1941) granted to the Illinois Commerce Commission complete control over public utilities. Section 49a of the act, added in 1935, provided that a public utility should not abandon or discontinue its service without having secured the approval of the commission. Other sections of the statute, as originally enacted and as added by amendment, gave the Commerce Commission extremely broad powers over all aspects of public utilities.

In that case an electric utility had been granted a franchise by a city to place its poles and other equipment upon and under the streets. When the franchise expired, the utility company refused to remove its equipment. An ordinance was passed directing removal. The city then also filed a suit for a mandatory injunction to compel the removal of the equipment. This suit finally reached the

Illinois Supreme Court, which held squarely in 1936 that the Public Utilities Act had withdrawn from the city the power to determine whether or not the utility company should continue or cease its business in the city [*City of Geneseo v. Illinois Northern Utilities Co.*, 363 Ill. 89 (1936)]. The Supreme Court in its opinion used language similar to that used by the respondent in the case at bar:

> "It is obvious that by this enactment [the Public Utilities Act] it was the legislative intent to withdraw from local municipalities supervision of public utilities and to vest the same in the Commission with the exclusive power of regulation and control of all means and instrumentalities used by the utility in the conduct of its business" (363 Ill. 95).
>
> "To permit the city to exercise control over the instrumentalities of a public utility occupying the city streets would be to give to the city in that respect concurrent jurisdiction with the Commission of a public utility, a result not contemplated by the statute and one which cannot be drawn therefrom by a legitimate interpretation thereof" (363 Ill. 97-98).

After this adverse decision, the city filed a complaint with the Commerce Commission praying that the utility be ordered to remove its equipment from the streets. The commission denied the prayer of the complaint on the ground that public convenience and necessity did not require the termination of the service of the utility. This proceeding also eventually reached the Illinois Supreme Court and in this recent decision *it completely reversed its former holding.*

Obviously the regulation of public utilities by the Commerce Commission and the regulation of the sale of milk involve different problems; and the Illinois Public Utilities Act is of an entirely differently character from that of the Milk Pasteurization Act of 1939. Nevertheless the decision

in the *Geneseo* case is extremely important here because it represents the present attitude of the Illinois courts toward legislative grants of municipal power. As we have said repeatedly, the case at bar presents a simple problem because it is only necessary to look to the clear and unambiguous language of the saving clause in the 1939 statute. But the opinion in the *Geneseo* case answers a number of the arguments presented by the respondent. We note a number of matters discussed in the opinion.

1. After stating the proposition that a grant of a specific power will impliedly repeal a like power previously granted to a municipality, the opinion continued (378 Ill. 514):

> "*This is not necessarily true where there is merely such a conflict between the granted powers of the respective governing bodies that part may remain in effect and part remain unaffected.*" (Italics ours.)

In the case at bar the prohibition of the use of paper milk containers by the City of Chicago may remain in effect even though the 1939 statute provides that paper milk containers "shall be manufactured and transported in a sanitary manner."

2. In an earlier case [*Chicago Motor Coach Co.* v. *City of Chicago*, 337 Ill. 200, 169 N. E. 22 (1929)] the Illinois Supreme Court had held that the city had no power to prohibit the operation of motor busses in the city streets when the motor busses had a certificate of convenience from the Commerce Commission. The ground of the decision was that the earlier power of the city to regulate the use of the streets had been repealed by implication by the Public Utilities Act. In the *Geneseo* case the *Chicago Motor Coach Company* case was discussed at length. The following comment on the *Chicago Motor Coach Company* case completely an-

swers the distinction attempted to be drawn by the respondent in the case at bar between "regulation" and "prohibition." The court said (378 Ill. 518):

> "As the basis of its decision the court held that the city never had any right under any of the powers granted to it by the legislature to *prohibit* the operation of automotive vehicles on the city streets, and while it had power under paragraph 65.8, to *regulate* the use of the streets by such vehicles, regulation was inconsistent with prohition or exclusion." (Italics added.)

And the court later said that this language in the earlier case "is not adhered to" (378 Ill. 530).

3. The opinion of the Illinois Supreme Court shows that the problem is one of statutory construction—that is, whether or not the later exercise of power by the state repeals the earlier grant of power to the municipality. Of repeals by implication in this type of legislation the court said (378 Ill. 529):

> "Repeals by implication are not favored. It is only when there is a clear repugnancy and both acts cannot be carried into effect that the former is repealed. *People* v. *Burke*, 313 Ill. 576, 145 N. E. 164; *People* v. *Czarnecki*, 256 Ill. 320, 100 N. E. 283. Statutes which are seemingly repugnant should, if possible, be so construed that the subsequent act may not operate to repeal by implication the earlier act. *People* v. *Board of Education*, 349 Ill. 390, 182 N. E. 455; *People* v. *Shader*, 326 Ill. 145, 157 N. E. 225. Where a special act is repugnant to or inconsistent with a prior general statute a partial repeal of the latter will be implied or exception grafted upon the general statute. *People* v. *Missouri Pacific Railroad Co.*, 342 Ill. 226, 173 N. E. 816. In determining whether one statute is repugnant to another the court should consider its several parts in connection with correlated sections in pari materia. *People* v. *Board of Education, supra.* The repeal by implication of one act by a later act is not effected by

mere conflicts or inconsistencies between them, but only where the carrying out of the later act prevents the enforcement of any part of the former. To the extent they are in conflict the first act is repealed, but the parts of the first act not affected remain in full force and effect."

4. Of the attitude of the court in construing legislation of this type the opinion also said (378 Ill. 533):

> "It is not for us to judge the propriety of legislation, but to construe the laws when enacted. The legislature has not seen fit to say, in express language, or by the enactment of directly conflicting provisions, that the control of the occupancy of the streets of a city has been transferred to the Illinois Commerce Commission, and, as we construe the law, they never did intend so to do."

In the case at bar the majority opinion of the Circuit Court of Appeals, in saying that the power of the city to forbid the use of paper containers would result in "chaos" and would make the state "subservient" to the city, was not "construing" the saving clause but judging "the propriety of legislation."

5. The Public Utilities Act involved in the *Geneseo* case contained a saving clause (sec. 81; ch. 111⅔, sec. 85, Ill. Rev. Stat. 1941) reading as follows:

> "Nothing in this Act shall be construed to limit or restrict the powers now or hereafter granted to cities to pass ordinances for the protection of the public health, safety, comfort and the general welfare, or governing the regulation, control or occupation of streets, highways and public property within the city."

The language of this clause is obviously of limited effect in comparison with the wide scope of the Public Utilities Act and is much less comprehensive than the saving clause in the Milk Pasteurization Plant Act of 1939, which, being

in the same language as the title of the act, necessarily covers everything within its scope. Neverthless, in the *Geneseo* case the Illinois Supreme Court gave a *broader* interpretation to the saving clause than had been given in earlier decisions. In *Village of Atwood* v. *C. I. & W. R. R. Co.*, 316 Ill. 425 (1925), the court had said (p. 429) that section 81 concerned only local utilities in cities which had adopted article VI of the act. In *Chicago Motor Coach Co.* v. *City of Chicago*, 337 Ill. 200 (1929), and in the first *Geneseo* case, 363 Ill. 89, 96 (1936), the court had held that the saving clause related only "to the original installation or construction of the utilities upon the streets and not to the supervision, regulation and control of the operation of such facilities after installation." Both of these earlier constructions of the saving clause were rejected in the opinion in the second *Geneseo* case (378 Ill. 523-524, 530.

6. In the *Geneseo* case the Illinois Supreme Court emphasized the importance of the maintenance of municipal authority. Counsel for the utility company had pointed out the financial effect of the decision upon utility companies. In commenting on this factor in this case, the court said (378 Ill. 533):

> "Giving full weight to appellee's claim of the extent the construction herein will affect public utilities, it is equally true *the opposite construction will have as great, if not greater, effect upon the administration of corporate powers by cities and other municipalities.*" (Italics added.)

The Illinois Supreme Court's concern for the powers of Illinois municipalities is in great contrast to that shown by the Circuit Court of Appeals in the case at bar.

* * * * * *

The respondent does not mention the fact (noted in petitioners' brief, p. 14) that the 1872 statute has been supplanted since 1939 by the 1941 Revised Cities and Villages Act, which, in a provision more specific than the earlier provision in the 1872 act, provides expressly that the city has the power to regulate "the manner in which any beverage or food for human consumption is sold" (see petitioners' brief, p. 14). Even if the 1939 statute repealed impliedly the former grant of power in the 1872 act (which of course we deny), this new provision has not only re-conferred the power on the city but has expanded the city's power. Section 50 of the 1872 act gave the city power "to regulate the sale of . . . provisions and to provide for the place and manner of selling the same." The new statute uses the word "beverage" which was not in the former statute. While the older statute gave the city power "to provide for" the manner of selling, the new statute says the city may "regulate the manner in which" the beverage is sold.

The respondent's discussion (pp. 37-39) of an earlier case does not detract from the pertinence here of *City of Ottawa* v. *Brown*, 372 Ill. 468 (1939). It is of vital importance here as indicating the attitude of Illinois courts in construing legislative grants of municipal power. There, as here, the city had a power to regulate under the 1872 Cities and Villages Act. There, as here, the state began to regulate. There, as here, the statute contained a saving clause. And there, as should have been held here, the Illinois Supreme Court held that the pre-existing power of the city was retained by the saving clause, although the same claims of conflict between city and state regulation could be made as are made here.

The respondent reiterates the idea that the city regulations may not prohibit what the state permits (brief, pp.

66, 63) and this is said to be a condition of a valid ordinance. There is no rule of law to this effect. The state may authorize the city to forbid what the state permits. If this were not true, it would be impossible for city regulations to go further than state regulations. The respondent attempts to extract a purported rule to the contrary from the opinion of the Illinois Supreme Court in *City of Chicago* v. *Union Ice Cream Mfg. Co.*, 252 Ill. 311-315, (1911). There, in holding an ordinance valid, the court noted in passing that the ordinance "does not prohibit what the statute permits." There was no holding that any ordinance is invalid which prohibits what the statute permits, as argued by the respondent.

The respondent (pp. 23, 57) seems to deny that even before the 1939 statute the city had power to forbid the use of paper milk containers. There is no argument in support of this contention. As shown by the lengthy discussion in the petitioners' brief (pp. 13-17), the 1872 Cities and Villages Act contained numerous provisions that gave the city, as held in *Koy* v. *City of Chicago*, 263 Ill. 122, 131 (1914), the power to require that "the receptacle in which milk is contained . . . be of prescribed character." The opinion of the Circuit Court of Appeals so interpreted the *Koy* case when it referred to "the broad field of regulation which it (the city) had theretofore had as recognized in *Koy* v. *City of Chicago*, 263 Ill. 122."

The respondent's brief (pp. 12-19) cites a number of Illinois decisions. The question presented in all of the cases was one of the intention of the legislature: did the statute involved indicate an intention to withdraw the power of the municipality? In some of the cases there had been an early statute granting the power, an exercise of the power by the municipality, and then a later statute by which the

state did what the municipality had been authorized to do; and the later act was held to repeal the earlier by implication. The respondent's brief does not state clearly that the question presented here is one of statutory construction: did the 1939 statute repeal by implication the broad grant of power to the city in the 1872 Cities and Villages Act? The great extent of the power is shown by *Koy* v. *City of Chicago*, 263 Ill. 122 (1914). The saving clause in the 1939 statute, in saying that the power of cities is not impaired or abridged, states expressly that there is no repeal whatever of the power of a city or village, so that the statute may not be said to have impliedly repealed anything. In none of the cases cited in the respondent's brief (pp. 12-19) was there an operative saving clause as in the case at bar.

City of Rockford v. *Hey*, 366 Ill. 526 (1937), discussed at length by the respondent (brief, pp. 19-21, 50) was neither relied on nor cited by the Circuit Court of Appeals. It has no bearing here. That case held invalid an ordinance that required ice cream manufacturers to pay a license fee to the City of Rockford for inspection of their factories *in other cities*. The question there, as noted in the opinion (p. 530), was whether or not the City had authority to empower "inspectors of its health department to go beyond the corporate limits to inspect ice cream factories." No such question is raised here by the provision in the ordinance that "milk sold in quantities of less than one gallon shall be delivered in standard milk bottles." Here the ordinance operates only within the City of Chicago. The respondent was not refused a permit to sell milk in Chicago because its plant outside of Chicago does not comply with Chicago regulations but because the respondent seeks to sell milk in Chicago in a manner forbidden by the ordinance. The Chicago ordinance applies to milk sold

in Chicago whether placed in the container within or without the corporate limits. The vice in the Rockford ordinance, as noted in the opinion (p. 534), was that the legislature had not given municipalities power "to pass a regulatory and license ordinance which assumes to regulate ice cream factories outside their corporate limits." The prohibition of the use of paper milk containers in Chicago does not assume to regulate the respondent's plant at Chemung, Illinois.

The respondent discusses the statute at length in an attempt to establish a conflict between the ordinance and the 1939 statute. The sections of the statute and the regulations of the Department of Health merely contain some provisions *about* paper milk containers. They do not say that paper milk containers must be permitted, but merely recognize and regulate their use. The respondent's statement (pp. 50-51) that the State of Illinois "makes it illegal" for the plaintiff to sell milk in any way but in paper containers is clearly wrong. It may be that the plaintiff has no equipment to bottle milk and that the state regulations forbid the use of paper-container equipment for filling glass containers. But the state does not prevent the plaintiff from using other equipment to fill glass containers or from selling milk in glass containers.

In discussing the rule that the statute controls where there is a conflict between a statute and an ordinance, the respondent (p. 15) cites the quotation of the Circuit Court of Appeals (R. 1791) from 2 McQuillin on Municipal Corporations (2d Ed. 1928) 572. The court did not quote the entire sentence. The word "established" at the end of the quotation is not followed by a period but by a comma and, after saying that an ordinance may not be contrary to a

public policy expressed in legislation, the text continues with the following words:

> "unless there is a specific, positive, lawful grant of power by the state to the municipality to ordain otherwise, in which event the specific, positive, lawful grant is from the same source of authority that made and has been expressed through legislation the policy of the state."

This important clause not only shows that the problem is one of statutory construction, but applies expressly to the "specific, positive, lawful grant" of power to the city in the saving clause.

The respondent also quotes (p. 15) from 43 Corpus Juris 215-17, section 219, which states the general rule about conflicting ordinances and statutes. A more specific discussion in section 220 (pp. 218-220) shows that there is no conflict in the present case.

> "The rule that a municipal ordinance in conflict with a state law is void does not apply unless the state law with which the particular ordinance conflicts is intended to apply, and is, in fact, applicable and imperative in the particular municipal corporation in which such ordinance has been enacted" (43 Corpus Juris 219).
>
> "The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescriptions" (43 Corpus Juris 219-220).

The respondent (pp. 39-43) cites a Missouri and a Connecticut case on this point. In each case, the municipality forbade the sale of "raw" (i.e. unpasteurized) milk. In each case the state legislature had provided by statute for the sale of various types of milk, including raw milk. In one case, *Shelton* v. *City of Shelton*, 111 Conn. 433, 150 Atl.

811 (1930), the state statute permitting the sale of raw milk contained a saving clause to the effect that the statute should not affect the authority of a municipality to enact an ordinance "for the control, regulation, sale or distribution, within its limits, of milk which might be detrimental to the public health." It was held by a court divided three to two that this saving clause did not permit the municipality to forbid the sale of raw milk. The parties stipulated that raw milk was not "detrimental to the public health," so that the saving clause was clearly inoperative. In the other case, *State ex rel. Knise* v. *Kinsey*, 314 Mo. 80, 282 S. W. 437 (1925) it was held that an ordinance forbidding the sale of raw milk was invalid: There the state statute permitting the sale of raw milk *did not contain a saving clause* so that another statute giving the municipality power "to license and regulate milk dairies and the sale of milk" was repealed by implication. The factors noted clearly distinguish the case at bar from the Missouri and Connecticut cases. Moreover, on the peculiarly local problem presented here the decisions of non-Illinois courts are not important precedents. This is particularly true in view of the recent decision of the Illinois Supreme Court in the second *Geneseo* case discussed above.

II.

The fact that the State of Illinois regulates paper containers does not make unreasonable the ordinance prohibiting their use.

(Reply to respondent's Point II, pp. 52-60.)

There are two aspects to the respondent's contention on this point: (1) there is said to be a rule in Illinois that an ordinance must be reasonable aside from any question of constitutionality; (2) the unreasonableness of the ordi-

nance is said to be shown conclusively by the 1939 Milk Pasteurization Plant Act. The second point shall be considered first.

The respondent relies here upon the same factor relied upon in its Point I to show that the city lacked power to enact the ordinance—i.e., that the legislature has "approved" paper containers and found them to be "safe and sanitary" and "wholesome." The respondent speaks of "the approval of this type of container by the sovereign" and says that this is a type of container "which the supreme legislative authority of this state has permitted and approved and declared safe and sanitary" (brief p. 55). The approval relied on occurred in a statute that, through the saving clause in section 19, expressly preserved the city's power to forbid what the state approved. The approval operated only to the extent intended by the legislature and was granted subject to more stringent restrictions imposed by municipalities. This completely destroys the foundation of the respondent's argument. Its fallacy is further shown by its inevitable result. Once the state had regulated anything there could be no further regulation. The state could not give a city power to regulate further, for the city's more stringent restriction would be unreasonable as a matter of law. The respondent's argument, if adopted by the courts, would impose a serious limitation on the state's authority to make what it deemed a desirable distribution of internal governmental powers.

While the charge in the complaint (R. 14) was that the ordinance violates the due process clauses of the Illinois and federal constitutions, the respondent argues that there is some rule peculiar to Illinois that makes ordinances invalid if they do not meet the concept of "reasonableness," even apart from constitutional law.

This is said (respondent's brief, p. 54) to be an Illinois rule, "much more favorable to judicial review of municipal action than that of other jurisdictions." That this is an erroneous interpretation of the Illinois cases is shown by the fact that the case of *City of Lake View* v. *Tate*, 130 Ill. 247 (1889), the case cited by the respondent (p. 52) as establishing the rule and cited also in later Illinois cases, indicates the rule to be a general principle of the law operative everywhere. The *Tate* case quotes (p. 252) the classic work, Dillon on Municipal Corporations, as authority for the rule. The question of unreasonableness under this rule is determined by the same principles that operate in applying the due process clause. In the *Tate* case (p. 252) the court said that, in determining the question, "the court will have regard to all the circumstances of the city, the objects sought to be attained, and the necessity which exists for the ordinance." Also under this rule, the same presumption of validity exists as when the validity of an ordinance under the due process clause is raised. In *Chicago and Alton Railroad Co.* v. *City of Carlinville*, 200 Ill. 314 (1902), quoted from by the respondent (p. 52), the court said (p. 322):

> ". . . This ordinance, to be valid, must not, therefore, be unreasonable. The presumption, however, is in favor of its validity and that it is reasonable, and it is incumbent upon appellant to point out and show affirmatively wherein such unreasonableness consists. (*People* v. *Cregier*, 138 Ill. 401.) Ordinances of the character of the one under consideration are passed *under and by virtue of the police power*, which has been defined, in general terms, 'as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public.' (*Culver* v. *City of Streator*, 130 Ill. 238.) The determination of the question whether or not the ordi-

nance in question was reasonably necessary for the protection of life and property within the city was committed, in the first instance, to the municipal authorities thereof by the legislature. *When they have acted and passed an ordinance it is presumptively valid; and before a court would be justified in holding their action invalid, the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property should be clearly made to appear. . . .*" (Italics added.)

Thus whether the ordinance is challenged as unreasonable under the due process clause or under a principle of the law of municipal corporations, the question presented is the same. As stated in the *City of Carlinville* case quoted above, it is a question of the valid exercise of the police power and "the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property should be clearly made to appear." The petitioners have shown in their original brief (pp. 40-78) that the evidence here does not prove that the ordinance is clearly unreasonable. This answers the attack on the ordinance, whether the attack is based on an alleged violation of a constitutional right or otherwise.

The respondent (p. 53) cites *City of Chicago* v. *Chicago & North Western Ry. Co.*, 275 Ill. 30 (1916), and notes that a provision of the Chicago milk ordinance was there held invalid. The regulation involved was held invalid because it was physically impossible to make the tests required (see opinion, pp. 36-37), and this was in effect conceded by counsel for the city in the Supreme Court. The case illustrates, however, how reluctant the Illinois courts are to overturn ordinances regulating the milk industry. Although evidence was taken in the trial court, the Supreme Court reversed the case for further proceedings in the belief that proof might be presented to show that the ordi-

nance could be complied with. And the court reaffirmed the broad powers of the city over the milk industry (p. 39):

> "We realize how important this question is to the health of the people of Chicago and the State at large, and we have no hesitation in re-affirming the rules laid down in *Koy* v. *City of Chicago, supra,* and *City of Chicago* v. *Bowman Dairy Co., supra,* with reference to the right of the authorities of the city of Chicago to make all proper and reasonable regulations with reference to the care, transportation, sale and delivery of milk in order to protect and promote the health of the people,—especially the children,—of that great city. . . . ."

In view of the respondent's claim that the Illinois courts interfere with municipal regulations more readily than the courts of other states, we quote from *Gundling* v. *City of Chicago,* 176 Ill. 340 (1898), where a city regulation of the sale of cigarettes was upheld, the opinion stating (p. 349):

> "When the city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent and the consequences of neglect are more detrimental to the public good in this than in any other form of local evil. . . . "

The respondent says (p. 57) that this suit was filed challenging the city's power to prohibit paper containers before the passage of the 1939 act and that "the city's assumption that it had such power prior to the passage of the statute is highly debatable and vigorously contested." The complaint (R. 14) seems clearly to indicate that the only ground of invalidity alleged was under the federal

and state constitutions. Moreover, while making the above statement, the respondent presents no argument to show that the city lacked the power before the 1939 statute. We submit that petitioners' brief (pp. 13-17) establishes the power of the city under the 1872 Cities & Villages Act as construed by the Illinois Supreme Court in a number of cases, particularly *Koy* v. *City of Chicago*, 263 Ill. 122 (1914).

III.

The ordinance is not invalid on constitutional grounds.

(Reply to respondent's Point III, pp. 61-105).

(a) Principles governing the validity of the ordinance under the federal and Illinois due process clauses.

The respondent complains (p. 61) that the petitioners cite "very few Illinois cases" on the question of the reasonableness of the ordinance. The respondent overlooks the Illinois cases cited on pages 38 and 39 of the petitioners' brief all dealing with the reasonableness of regulations passed to protect the public health. In *Koy* v. *City of Chicago*, 263 Ill. 122, 130 (1914), the Illinois Supreme Court said that the regulation of the sale of milk *"is an imperative duty which has been universally recognized," there being no article of food whose impurity may "more quickly, more widely and more seriously affect the health of those who use it."* This duty was said to include requirements that "the receptacles in which milk is contained . . . be of prescribed character." While the complaint (R. 14) alleges that the ordinance is invalid under the federal constitution, not one decision of a federal court is cited in support in the respondent's brief.

The latest decision of the Illinois Supreme Court cited in the briefs on the question of the reasonableness of health regulations shows that the Illinois courts apply the same principle in determining the "reasonableness" of a health ordinance under the Illinois constitution as is applied in federal courts. In *People* v. *Quality Provision Co.*, 367 Ill. 610, 614 (1938), a regulation forbidding the addition of sodium sulphite to sausage as a preservative was upheld on the ground that it was within the power of the legislature to "declare sulphurous acid and its derivatives adulterants and forbid their use in food products" (p. 615). Indicative of the application by the Illinois Supreme Court of the same principle applied in federal courts was a long quotation in the opinion from the opinion of this court in *Price* v. *Illinois*, 238 U. S. 446, 451, 452 (1915), where it was said that a health restriction was a matter for the legislative judgment unless the article prohibited

> ". . . indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen."

The respondent has not presented the evidence required by this principle. The master, who heard the numerous expert witnesses testify, found that there was evidence in the record *from the respondent's own witnesses*

> ". . . from which the City Council could reasonably have concluded that prohibition of paper containers was necessary and appropriate to protect the purity and wholesomeness of milk" (R. 1734).

Similarly the majority opinion of the Circuit Court of Appeals said:

> "It is true the record discloses some evidence in support of defendants' contention that the use of such containers presents a hazard to health" (R. 1794).

And the opinion of the dissenting judge said similarly:

> "The master found upon substantial evidence a number of facts bearing upon the undesirability of the use of paper milk bottles, showing clearly that at least the question of desirability of their use is debatable" (R. 1796).

This evidence is discussed at length in the petitioners' brief (pp. 40-69). Under the applicable principles of constitutional law, applied by the Illinois courts as well as by the federal courts, it is clear that the ordinance forbidding the use of paper milk containers is not invalid.

The respondent's brief cites only two Illinois cases in which public health regulations were held invalid as discriminatory and unreasonable under the Illinois constitution. The cases are *People* v. *Carolene Products Co.*, 345 Ill. 166 (1931), and *Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62 (1936) (respondent's brief, p. 63). In these cases statutes forbidding the sale of "filled milk" (skimmed milk to which fat or oil other than milk fat, such as coconut oil, has been added) were held invalid. As noted in *People* v. *Quality Provision Co.*, 367 Ill. 610, 615 (1938), the prohibitions in the *Carolene Products Company* cases were invalid because the thing sought to be condemned by the legislature was the sale of a known wholesome food. It was even stipulated in the case that the product involved was wholesome. In the case at bar, both the master and the Circuit Court of Appeals pointed out that the evidence shows that there are public health hazards in the use of paper milk containers. In *People* v. *Price*, 257 Ill. 587 (1913), also cited by the respondent, the public health regulation was upheld and the decision of the

Illinois Supreme Court was affirmed in *Price* v. *Illinois*, 238 U. S. 446 (1915).

The respondent does not attempt to differentiate the many cases cited in the petitioners' brief (pp. 36-40) upholding a great variety of public health regulations imposed under the police power. We emphasize particularly *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176 (1935),* holding valid a requirement that raspberries and strawberries be packed only in certain containers, and *Koy* v. *City of Chicago*, 263 Ill. 122 (1914), upholding the validity of an ordinance requiring the use of a certain apparatus for recording the temperature of milk during pasteurization.

(b) Evidence in the record shows that the prohibition of paper containers for delivering milk is not unreasonable.

(Petitioners' brief, pp. 40-68; respondent's brief, pp. 70-90.)

Before discussing the subdivisions of this point, we have several general comments to make on the respondent's discussion of the evidence.

The respondent's emphasis on the testimony of Dr. Lloyd Arnold.

Throughout respondent's discussion are many references to the testimony of Dr. Lloyd Arnold, a witness for the petitioners. His qualifications and his testimony were noted in the petitioners' brief (appendix C, pp. 98-99). An entire page in respondent's brief (pp. 93-94) is de-

*The opinion (pp. 183-184) completely answers the respondent's vague claim (brief, p. 64) that the Chicago ordinance "fosters monopoly."

voted to an attempt to belittle his testimony. The record contains a complete answer.

The characteristics of paper containers that create public health hazards are proved in the record, not merely by the testimony of Dr. Arnold, but by the testimony of *respondent's own witnesses.* In discussing the evidence about the reasonableness of the ordinance, the petitioners' brief relied almost entirely on the testimony of respondent's witnesses because it was unnecessary to rely on Dr. Arnold's testimony. Now the respondent, instead of replying to the petitioners' discussion of respondent's own evidence, attempts to discredit Dr. Arnold's testimony. Throughout his testimony (R. 1061-1201) he stated his opinion to be that there were public health hazards in the various materials used in paper containers and in the various processes in their manufacture. The master in his report concluded that the reasonableness of the ordinance was supported by "evidence in the record, from plaintiff's own witnesses, independent of the corroborative testimony of Dr. Arnold."

The record contains abundant proof of the unusual qualifications of Dr. Arnold to testify about paper milk containers. His qualifications as shown by the record are noted in petitioners' brief (p. 98). We call particular attention to the facts that since 1927 Dr. Arnold has been a full professor in charge of the department of bacteriology and public health at the University of Illinois College of Medicine, and has acted as consultant to the Illinois State Department of Public Health. He has personal knowledge of the various processes involved in the manufacture of paper, for since 1928 he has been a consultant on the bacteriological problems involved in paper manufacture for the Kimberly-Clark Corporation, a manufacturer of a

variety of paper products (R. 1101). And during 1938 he became familiar with the processes in the manufacture of the paper used in paper milk containers, in the work done by him for the Sealrite Corporation (R. 1096, 1102).

The only other witness with approachably similar knowledge of paper manufacture was respondent's witness Dr. John Sanborn. Doctors Prucha and Tracy had made only brief visits to paper mills (R. 475, 512). Respondent's witnesses Tonney, McNally, Orvis, Woodman and Packer—all of them gave opinions about the sanitary aspects of paper containers—had never visited paper mills. Also Dr. Arnold was the only witness with medical training who had personal knowledge of paper manufacture. The respondent's witnesses Sanborn and Prucha, who had some knowledge of paper manufacture and had conducted experiments on paper milk containers, are bacteriologists with degrees of Doctor of Philosophy. So Dr. Tracy is a Doctor of Philosophy, a "dairy manufacturist" (R. 533). The witness Tonney, a doctor of medicine, had never visited paper mills (R. 921).

Paper milk containers do not promote health.

The respondent asserts that paper containers "promote health" and are "wholesome", as if they possessed health-giving properties of some kind. There is no evidence in the record to support this.

With all the possible health hazards in the use of paper containers as noted in the petitioners' brief (pp. 44-68), paper containers have but one minor advantage over glass containers from the standpoint of health. This advantage is in the delivery of milk to residences where there is a contagious disease. Paper containers are single-service containers which are thrown away by the consumer after use. Glass containers are collected from consumers and

re-used. If there is a contagious disease at a consumer's house, the possible danger with glass containers is that the person collecting and handling the used bottle before sterilization may deposit elsewhere bacteria that he may have picked up from the used bottle. The danger is thus not to the people in quarantine but to others, and consequently the last paragraph of section 3094 of the Chicago ordinance (R. 109, last paragraph) provides that milk bottles shall not be taken from quarantined premises "during the period of quarantine or thereafter, until said bottles or containers have been sterilized, and permission has been granted by the Board of Health for the removal of same." With a single-service container the same problem exists because, when the paper container is thrown away, it is collected and handled by garbage collectors who may spread the contagion. Admittedly this danger may not be as great as the danger with glass containers handled by people delivering milk. Even so, this slight advantage of the paper over the glass container involves only an infinitesimal part of the total amount of milk delivered in Chicago and is outweighed by the hazards of paper containers to consumers at large. It does not show that the City Council is unreasonable in forbidding the use of paper containers in the delivery of the 1,300,000 quarts of milk daily consumed in Chicago.

Other statements in respondent's brief not supported by the record.

Apparently in the belief that arbitrary action by the Chicago Board of Health would affect the reasonableness of the ordinance, the respondent says (p. 62) that the record shows:

> ". . . that the board of health of the City of Chicago made no effort whatever to ascertain the sanitary

properties of single service containers until almost a week after this suit was filed''

and R. 1003 is cited in support. The record refers only to testimony of the chief chemist of the board that he started making *tests* of paper milk containers in February, 1939 when the suit started. This does not show that ''no effort whatever'' was made before that time to ascertain the sanitary properties of paper containers; and, while the question was not in issue at the trial, the record incidentally shows the contrary. In 1937 Paul F. Krueger, chief sanitary officer of the board, made a trip to Urbana, Illinois, with a bacteriologist of the board to inspect paper containers and the filling machine used in the Department of Dairy Husbandry of the University of Illinois (R. 987). At conferences held at Geneva, New York, in 1937 and 1938 on the sanitation of paper milk containers, someone attended on behalf of the board (R. 191-192).

Other investigations of paper milk containers also came to the board's attention. On December 4, 1937 Dr. Lloyd Arnold made a report about paper milk containers to Dr. Herman N. Bundesen, president of the board (plaintiff's exhibit 4, R. 1397-1469). The report began by stating, ''cardboard of a satisfactory standard quality can be obtained and used for this purpose'' (i.e., in milk containers), and concluded, ''from my personal investigations and observations I see many advantages to single service paraffin coated milk containers for fresh fluid milk'' (R. 1398-1399). Dr. Arnold testified in this case that this was merely a preliminary report (R. 1149-1150) and that he later changed his opinion* about the advantages of paper

*Dr. Arnold's opinion that the paper milk container is not satisfactory from a public health point of view was affected by his consulting work done in 1938 for Sealrite Corporation, Fulton, New York, a manufacturer of paper milk containers; he advised the Sealrite Corporation of his conclusion that they are unsatisfactory (R. 1103-1104, 1201).

milk containers (R. 1103). In the spring of 1938 Dr. Arnold performed tests on the bactericidal effect of paraffin and sent the results of the tests to the board of health (R. 1131). During March and April of 1938 Dr. Arnold investigated paper containers further and found all of them to show the same type of absorption and during the last of April or in May, 1938 reported to Dr. Bundesen of the board that single service containers for milk might not be authorized safely by the City of Chicago (R. 1121-1122). Speaking of his earlier report, Dr. Arnold testified, "there are factors I did not know anything about that are operating that should be included in considering the sanitary standards of the paper container" (R. 1149). The above testimony in the record completely disproves the respondent's statement that the board of health "made no effort whatever" to ascertain the sanitary properties of single-service containers before the suit was filed.

The respondent says (pp. 68-69) that paper containers are used for a number of products in Chicago "without restriction, inspection or regulation" and R. 694 is cited in support. The record shows merely that paper containers are used for the purposes mentioned without "any objection" by the board of health and that tests are not conducted by it to determine their sanitary quality. This does not mean that other inspection devices are not used or that these containers are used "without restriction, inspection or regulation."

The respondent (p. 69) makes the amazing statement that the evidence proves "that the single service container in question has not at any place or at any time been *even suspected* of constituting a health hazard." The following articles by the respondent's own witnesses show great concern over the public health hazards in the use of paper milk containers:

"Reasonable Sanitary Standards for Paper Products," Sanborn (plaintiff's exhibit 17, R. 1507-1511).

"Sanitary Aspects of Paper Milk Containers," Prucha (plaintiff's exhibit 62, R. 1591-1599).

"Are Paper Milk Containers Sanitary?" Prucha (plaintiff's exhibit 63, R. 1600-1604).

"Microbiology in Pulp and Paper Manufacture," Sanborn (defendants' exhibit 2, R. 1665-1670).

1. Paper milk containers are not sterile when formed and do not receive effective bactericidal treatment before they are filled with milk.

(Petitioners' brief, pp. 44-47; respondent's brief, pp. 70-74.)

The respondent does not deny the *facts* stated in the petitioners' brief on this point.

The respondent does not answer the petitioners' argument that the lack of sterility coupled with he absence of bactericidal treatment before use shows that it is not unreasonable to prohibit the use of paper containers. If paper containers were sterile when manufactured (as the glass container is) or if they received effective bactericidal treatment before use (as the glass container does), there might be some ground for the claim of unreasonableness; and so the complaint in this case, which alleged that paper milk containers were sterile, may not have been subject to a motion to strike. But the combination of these two factors—whatever the evidence may be about the sanitary quality of the respondent's and other paper containers at the time of the trial—shows that there are new dangers present in their use, dangers which the City Council deemed sufficiently great to require the prohibition of their use. Aside from the real danger in their use as indicated by the evidence, the mere possibility of danger is enough to

place the matter within the discretion of the legislative body.

The respondent says (p. 73) that all its expert witnesses "were unanimous that health authorities possessed as adequate bacteriological control over paper milk bottles as they had over glass bottles." Record references are not given. We note some of the testimony apparently relied on.

The tests made by the witness Orvis on milk in glass and paper containers were made on milk from different milk plants, as the witness admitted ("I have no comparison of glass out of the same plant" R. 570), and his testimony was objected to on that ground (R. 571). Obviously the difference in the milk rather than in the containers may have accounted for the higher bacterial content of the milk in the glass containers. The testimony of this same witness about the comparative problems in glass and paper containers was of no probative value: "I *think* our problems in glass are greater, *from my limited experience so far*, than those in paper" (R. 605).

The opinion of the witness Tonney (R. 910) that the paper container represents a distinct advance over the glass milk container in the sanitary sale of milk must be considered in the light of his qualifications. He had had no personal knowledge of any of the various processes in the manufacture, converting, or filling of paper containers, except for visits of a half-day each to two dairies using paper containers (R. 921, 922, 925).

The respondent says (p. 71), citing R. 406-7 and 424, that the witness Riee "found the paper bottle superior to the glass bottle in abating the spread of infectious diseases." In his testimony this witness did state what he thought were some advantages of paper over glass containers. He mentioned the following as one:

> "the fact that the bacteria count is often housed up in it, so that the bacteria count are comparable or *sometimes* superior *if the sterilization of the glass container is not* adequate." (R. 407; Italics added.)

Obviously a particular paper container may be more sanitary than a particular glass container that has not been properly cleaned.

As the above comments show, the respondent's statement that paper containers are more sanitary than glass is not supported by the evidence apparently relied on by the respondent. Some of these witnesses based their opinions on their experiences with glass containers in places other than Chicago. The petitioners' brief (pp. 70-73) pointed out that experience elsewhere does not determine the questions at issue here. We note, however, that in places where adequate sanitary control of glass containers is not practiced the paper container may seem superficially to be an easy solution to the problem of obtaining sanitary milk containers. As the above quotation from the witness Rice shows, the bacteria count in paper containers may be less than in glass containers that are not adequately sterilized. Admittedly the paper container eliminates the problem of supervising the process of cleaning used containers. The evidence in the record here shows, however, that the paper container creates the new problem of supervising the sanitation of the many processes in its manufacture.

2. Paper containers are absorbent.

(Petitioners' brief, pp. 47-51; respondent's brief, pp. 70-74.)

The respondent minimizes the absorption of milk by the paper in its container, although, as noted in petitioners' brief, the respondent thought it sufficiently important in its

complaint to allege repeatedly that its containers are non-absorbent. The respondent says (p. 70) that only "a few drops" of milk are absorbed. This is hardly supported by the record, for the respondent's witness Prucha found the amount of absorption to be forty drops per quart container in forty-eight hours (R. 716). This is not a small amount for a container that is often used in the household for storing milk, particularly when it is remembered that Chicago's daily consumption of milk is 1,300,000 quarts. But of course the primary objection to absorption is that *absorption permits whatever is in the paper to get into the milk.*

The respondent attempts to answer this point by saying that the absorption is immaterial because there are no harmful bacteria in the paper in the container. And in support of this statement the testimony of numerous witnesses is relied on. For example, the respondent says (p. 71) that in the opinion of the witness John R. Rice "supported by research, absorption of milk in the paper board presented no health problem" and R. 425 is cited in support. The same witness testified that *if* the paper board is free from bacteria, absorption does not present a health problem (R. 412). With this testimony the petitioners may agree. But the record does not show that the paper used in paper milk containers, even the paper in respondent's container, is free of bacteria or of harmful bacteria. Any container that contributes bacteria *of any kind* to milk is undesirable. The respondent's witness Sanborn, writing in 1938, said that "the types of organisms *predominating* in milk container board are heat-resistant forms," implying that other forms are also present. He continued,

> "While these species are clearly not disease-producing types, it is desirable from the standpoint of general sanitation and cleanliness to hold their total numbers

to a minimum in paper to be used with perishable foods." (R. 1514.)

The respondent speaks (p. 71), of the "haphazard *inspection* of glass bottles by the petitioners, (1400 bottles being *inspected* over a period of a year—)." The record reference (R. 986) shows that the testimony was about 1400 bottles *tested* in a year. Tests of the bottles themselves are but one of the inspection devices employed in Chicago. The bottling plants themselves are inspected in detail regularly ("once or twice a week, but at least every two," R. 970-2).

The witness John R. Rice is said (respondent's brief, p. 71) to have testified that he never "found any pathogenic bacteria on any paper board used in paper milk bottles." He also testified that the paper *was not tested for pathogenic bacteria*, the only basis for the testimony quoted by the respondent being that the "gross appearance" of the bacteria "was not of pathogenic forms" (R. 413).

The witness Woodman is said by the respondent (p. 72) to have testified that "in his experience disintegration tests offered adequate protection at all times and his experiments showed that the empty paper container was essentially free of bacteria in 300 to 400 tests." The record reference (R. 680) does not bear out the statement about disintegration tests; and indeed the witness stated he "did not ever conduct any disintegration tests" and that no one connected with the Evanston Board of Health (Woodman's employer) had ever done so (R. 682). Also, while at one point Woodman said that he found the paper containers "free of bacteria" (R. 680), he admitted immediately thereafter (R. 681) that his regular rinse tests showed 7% of the containers to have more than 1,000 bacteria per container.

The respondent says (p. 73) that the United States Public Health Service "recommends the use of single-service containers." As noted elsewhere, the only "recommendation" is found in the provision in the model ordinance regulating their use (R. 1678). The Health Service has called particular attention to the "porous condition" of paper containers as "undesirable" (petitioners' brief, p. 48).

3. Paraffin from paper containers gets into the milk placed in them.

(Petitioners' brief, pp. 51-53; respondent's brief, pp. 74-77.)

The plaintiff says (p. 25) that there is no evidence tracing any disease or illness to the paraffin from paper containers that gets into the milk. The petitioners' brief (pp. 52-53) cited cases holding that the adulteration of milk may be forbidden even though the adulterant is not harmful to health. These cases are not mentioned by the respondent.

The respondent also (pp. 74-76) stresses testimony that paraffin is not a poison and that particles of it may be swallowed without ill effects. This does not mean that it is not undesirable for children to take paraffin as a part of their regular diet, as shown by the testimony of Dr. Black discussed in petitioners' brief (p. 52). In *People* v. *Quality Provision Co.*, 367 Ill. 610 (1938), where a statute declared the addition of any derivative of sulphurous acid to food to be an adulterant, it was held valid to prohibit the use of sodium sulphite, a derivative of sulphurous acid, as a preservative in sausage, although the testimony showed that sodium sulphite is used medicinally (see opinion, p. 611).

The respondent contends that the provision of the Illinois Criminal Code cited by petitioners (brief, p. 53) has no bearing on this case. Admittedly the respondent is not being prosecuted here for violation of the criminal code. The broad language of the section—prohibiting the addition of *any* foreign substance to milk—indicates the great lengths to which the Illinois legislature has gone in protecting the milk supply from foreign substances.

4. Odors from paraffin and bacteria in paper containers are imparted to the milk.

(Petitioners' brief, pp. 53-56; respondent's brief, pp. 78-81.)

The petitioners stated (brief, p. 54) that the act of the respondent's witness Dr. Sanborn in smelling a container and the witness's testimony about this proved that the paraffin in paper containers has an odor. This undisputed fact is not disproved by pointing out, as the respondent does (brief, p. 78), that Dr. Sanborn testified that he did not know at what temperature paraffin oxidizes and becomes rancid. A fact is not disproved by showing that a witness did not know why the fact occurred.

While the petitioners may not have produced a witness to testify here that in his experience paraffin and bacteria contribute odors to the milk in paper containers, the evidence discussed in the petitioners' brief shows that paraffin and bacteria *may* contribute odors to the milk. This alone is enough to form a basis for a controlling legislative discretion.

The respondent notes (p. 79) that the testimony of its witness Peterson, who testified about paraffin, was "uncontradicted and unimpeached." This is so only if the testimony of respondent's witnesses Keyser (R. 1347-8) and

Sanborn (R. 303-304) is disregarded. Peterson has "served as salesman, engineer and technical engineer" for the Standard Oil Company of Indiana, which manufactures the paraffin used in paper milk containers (R. 942-3). The tests he described (and on which the respondent relies, p. 79) were made to convince the Ex-Cell-O Corporation to use his company's paraffin (R. 944).

5. Effective sanitary control of paper containers requires supervision and control of all processes in the manufacture of paper and its conversion into containers.

(Petitioners' brief, pp. 56-67; respondent's brief, pp. 81-86).

The fundamental error in the respondent's discussion of the point is seen in the statement,

> "The evidence is undisputed that the public health authorities have just as much control over the sanitation of the paper milk container after it reaches the confines of the City of Chicago where it is subject to physical and chemical tests as they have over glass milk bottles * * *." (Respondent's brief, p. 85.)

One basic fact about the sanitation of glass containers is that they not only are absolutely sterile when manufactured (R. 169) but receive bactericidal treatment before each use and with the best method of sterilization it is possible to obtain a sterile glass bottle "according to bacteriological tests" (R. 170). The bactericidal treatment at the local dairy can be thoroughly inspected and controlled locally and, as shown in the petitioners' brief (pp. 60-61), this is done in Chicago. Aside from the application of hot paraffin, which "is not an effective sterilizing agent" (R. 194), there is no local bactericidal treatment of paper containers.

The respondent describes (p. 82) the testimony of Prucha as "forceful and persuasive that the mere passage of time is a great purifier, particularly with respect to the harmful type of bacteria," and cites plaintiff's exhibit 46 (R. 1572). This exhibit represents a test made on September 6, 1939 (R. 632), and was testified about (R. 632-40) on September 12, 1939. The test purported to show that bacteria with which paper is innoculated are completely absent in nine hours as the result of a "self-purification" process, and that they are almost all killed in 60 minutes (R. 1572). Dr. Prucha testified, however, that he only tested the samples for the prodigiosus bacteria with which the paper was innoculated, and that "there were other types of non-spore-forming bacteria present in the paper after the expiration of the periods of time described in that exhibit"; the non-spore-forming bacteria are the more dangerous type (R. 780). Dr. Prucha's own testimony thus shows that plaintiff's exhibit 46 is not persuasive evidence of what it purports to prove.

The respondent also (p. 84) refers to testimony by Dr. Prucha that "by his bacteria counts on paper board he could determine whether it would be fit to be used for milk containers." The record reference (R. 838) shows that the particular counts referred to were those shown in defendants' exhibit 7 (R. 1671). Out of 70 samples of paper to be used for paper milk containers, 42 contained more bacteria than the standard of the United States Public Health Service of 100 per gram (R. 792-3). Obviously a high count of bacteria would indicate that the paper was not fit for milk containers. What makes the tests unreliable is that an inaccurate *low* count would indicate that the paper was fit for milk containers. There appears to be a clear conflict in the testimony of Dr. Prucha about the necessity of inspect-

ing paper mills. (Cf. petitioners' brief, p. 58, and respondent's brief, p. 84.)

The respondent (pp. 83-84) relies on testimony of the witnesses Orvis, Tonney, and Woodman that they did not believe inspectors had to visit paper mills. And the respondent says that Tonney was "thoroughly familiar with . . . the paper bottle operations" (p. 83). Tonney had never visited a mill making paper for milk containers (R. 921) or a converting plant (R. 922), and his knowledge of the filling of paper containers was based on visits of a half day each to two dairies (R. 925). The witness Orvis testified that he had never been in a paper mill (R. 573). The witness Woodman, when asked about operations at a paper mill, said, "I will have to tell you that I know nothing at all personally about any of that at the plant" (R. 684).

6. Paper containers are not transparent and cream does not rise to the top in them.

(Petitioners' brief, pp. 67-68; respondent's brief, pp. 86-90.)

The respondent (p. 88) refers to the witness Orvis as having testified that "the cream line does not necessarily determine the amount of butter-fat in particular milk." His testimony (R. 573) does not go as far as the respondent indicates:

> "You may get types of milk in which the cream line may not be very clear, but it is *generally* a comparable basis and not an absolute basis." (Italics added.)

The plaintiff does not refute this argument by pointing out (p. 87) that homogenized milk is permitted to be sold in Chicago. As shown by the definition quoted by the plaintiff, homogenized milk is mechanically treated for the very purpose of diffusing the cream throughout the milk. Also,

the stipulation in the record includes a fact not mentioned by the plaintiff: *the homogenized milk being sold is labelled and sold as such* (R. 1332).

(c) Factors relied on by the District Court and in the majority opinion of the Circuit Court of Appeals are not controlling.

(Petitioners' brief, pp. 69-78; respondent's brief, pp. 90-104).

Weakness of presumption that ordinance is valid.

In attempting to support the dictum in the majority opinion of the Circuit Court of Appeals that the presumption of validity is "little more than a shadow," the respondent overlooks the fact that the presumption is in reality a self-imposed restriction, applied by the courts under the doctrine of the separation of powers, to avoid interference with the function of the legislature. It is a presumption of law and operates whether or not there is evidence that the members of the legislative body actually considered the factors that would support the validity of their action. Consequently the time element is of no importance.

Use of paper milk containers elsewhere.

The petitioners' argument is that on the facts and under the law the use of paper milk containers elsewhere is immaterial. The respondent attempts (brief, pp. 91-92) to answer this contention by referring to the testimony of health officials of Chicago suburbs about the use there of paper containers and by quoting at length in its brief (pp. 96-99) a number of letters from health officials about paper milk containers. The respondent does not deny that the record shows, as pointed out in the petitioners' brief (pp.

71-73), that the precautions taken in some municipalities as to paper milk containers are in fact very inadequate.

This is true also of the testimony to which the respondent now refers (pp. 91-92). For example, respondent cites the testimony of Woodman, an Evanston health official, that he did not consider it necessary to inspect paper mills or fabrication plants (R. 675). The same witness testified that he had never been to a paper mill where paper milk containers are made (R. 684). Respondent says that Evanston made 300 to 400 tests "*before* use of the paper bottles was permitted." The record shows that the tests, which were merely rinse tests, were made *after* the use began (R. 679-680) and the samples tested were not picked at random but were submitted by dairies (R. 673, 680). Woodman testified that paper containers were being used in Evanston without any regulations whatsoever pertaining to their manufacture and handling (R. 684). He also testified that, while tests were made, they did not "test the quality of the paper at all" (R. 684). Similarly the respondent refers to the opinion of Orvis, health officer of other Chicago suburbs, that the bacteriological control of paper containers equals that of glass. This witness had never been to a paper mill where paper containers are made (R. 583-584), although the respondent's witnesses Sanborn and Prucha state that milk sanitarians should inspect paper mills (petitioners' brief, pp. 58-59). In the municipalities for which Orvis was health officer paper milk containers had been in use for some time at the time of the trial and none of them had regulations concerning the manufacturing of the paper (R. 580). The respondent points out that these municipalities were sent monthly reports on the bacterial content of paper board by a Dr. Jordan and R. 583 is cited in support. Orvis testified at first that Dr. Jordan

himself selected the samples of paper for testing, but he later admitted that the source of information on this fact was a man at the plant of the Fieldcrest Dairy (R. 588-589). The testimony relied on by the respondent does not show that municipalities permitting the use of paper milk containers exercise proper sanitary supervision over them.

Experience elsewhere is a matter addressed to the discretion of the legislative body. Even if convincing evidence had been presented that health officers where paper containers are used can and do exercise adequate sanitary control over them (and the evidence here is otherwise), the court would be going far afield in making an investigation of the experience everywhere in order to determine the reasonableness of the ordinance. Yet this was the factor on which the majority opinion of the Circuit Court of Appeals relied in indicating that the ordinance is unreasonable.

The respondent says (p. 92) that the "daily sale of milk in single-service paper containers in Chicago by restaurants and drug stores was not actually prohibited or interfered with by the City or its Board of Health at any time" and R. 940 is cited in support. The reference is to the testimony of Frank H. Bergman, the manager of a restaurant in Chicago. His testimony was very brief. After identifying a paper container, he was asked if he had received "any instructions from the Board of Health of the City of Chicago that you are not to use these paper containers in the sale of milk." The witness' answers were: "Never that I know of"; "I don't remember"; "That would go to our main office"; "No, I could not tell you of any" (R. 940). This testimony clearly does not support the respondent's statement. And the regulation of the Chicago Board of Health, quoted in petitioners' brief (p. 77n), shows that the sale of milk in paper containers by restaurants and drug stores is prohibited.

The letters quoted in the respondent's brief (pp. 96-99) from health officials obviously were incompetent evidence. The letters contained opinions of the writers and were hearsay.

Respondent (p. 101) quotes from the opinion in *Standard Oil Co.* v. *City of Marysville*, 279 U. S. 582 (1928), and implies that the following quotation does not state the Illinois law:

> "We may not test in the balance of judicial review the weight of sufficiency of the facts to sustain the conclusion of the legislative body."

This same principle was stated by the Illinois Supreme Court in *People* v. *Price*, 257 Ill. 587 (1913), quoted recently in *People* v. *Quality Provision Co.*, 367 Ill. 610, 614 (1938), the court saying of a disputed question of the reasonableness of a health regulation:

> "In such cases in enacting legislation in the exercise of the police power of the State the legislative declaration that it is unwholesome must be accepted by the courts, and they will not investigate the facts for the purpose of determining whether the declaration of the legislature was warranted by the facts."

The respondent says (p. 102) that the distinctions between milk and other foods packaged in paper containers are "superficial." This was not the opinion of the respondent's leading witness Sanborn when he said that milk was the most perishable and easily contaminated food that is placed in paper containers (R. 1495). Nor was it the view of the Illinois Supreme Court when it said in *Koy* v. *City of Chicago*, 263 Ill. 122, 130 (1914),

> "There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely and more seriously affect the health of those who use it."

Here again the respondent says (pp. 102-103) that the Chicago Board of Health "has made no effort to prevent" the practice of the sale of milk in paper cartons by soda fountains and restaurants. Any sale so made violates a regulation of the board (R. 1697).

IV.

The respondent's paper containers are not "standard milk bottles".

(Reply to respondent's Point IV, pp. 106-115.)

There is a preliminary procedural question about the raising of this point by the respondent. The Circuit Court of Appeals held (opinion R. 1784-1788) that the trial court erred in holding, contrary to the master, that the respondent's paper container is a standard milk bottle. This required a modification of the trial court's decree and the judgment of the Circuit Court of Appeals (R. 1797) was that the cause should be remanded to the District Court "for the sole purpose of modifying the decree so as to conform with the views expressed in the opinion of this court." The decree of the trial court (R. 1759-1760) contained a declaratory judgment that "the plaintiff's Pure-Pak single service paper milk bottle is a 'standard milk bottle' and that the same conforms with the city ordinances of the City of Chicago." On remandment of the cause, this declaratory judgment would have to be modified. In this court the respondent (without having filed a cross-petition for certiorari) now argues that the holding of the Circuit Court of Appeals on this point was erroneous. In this state of the record it may be that the respondent is not in a position to object to that portion of the decree unfavorable to it. The cases seem to indicate that this court exercises a wide discretion in considering objections urged by

respondents. See *Langnes* v. *Green*, 282 U. S. 531, 537-539, (1930); *Letulle* v. *Scofield*, 308 U. S. 415, 421-422 (1939).

In view of the fact that the construction of the ordinance is a peculiarly local question, it would seem that there is a good reason for this court not to review the ruling of the Circuit Court of Appeals. Nevertheless, we do not urge this court to rule one way or the other on the procedural point and we proceed to argue the question on the merits.

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The respondent seems to think that the case of *City of Chicago* v. *Ben Alpert, Inc.*, 368 Ill. 282 (1938), is inconsistent with the case cited by the Circuit Court of Appeals, *People* v. *Barnett*, 319 Ill. 403 (1926) and that the later case alone destroys the construction of the ordinance by that court. The cases are not inconsistent.

In the *Barnett* case a statute passed in 1887 when only men had the right to vote provided that jurors should be chosen from a list of "electors." Later when women were given the right to vote in Illinois, a woman sought to compel the jury commissioners to list her as a juror. It was held that the Illinois legislature, in using the word "electors" in 1887 meant only male electors, the opinion saying (p. 410):

> "The legislative intent that controls in the construction of a statute has reference to the legislature which passed the given act (25 R.C.L. 1029). Applying the rule of construction therein mentioned, it is evident when the legislature enacted the law in question, . . . it was intended to use the words 'electors' and 'elector' as the same were then defined by the constitution and laws of the State of Illinois. At that time the legislature did not intend that the name of any woman should be placed on the jury list, and must be held to have intended that the list should be composed of

> the names of male persons only. *In interpreting a statute the question is what the words used therein meant to those using them.*" (Italics added)

In considering a similar question in *Commonwealth* v. *Welosky*, 177 N. E. 656, (1931) Mr. Chief Justice Rugg said (p. 659):

> "General expressions may be restrained by relevant circumstances showing a legislative intent that they be narrowed and used in a particular sense."

In the *Barnett* case the general expression "electors" was restrained by the circumstance at the time of its use that only men had the right to vote. In the case at bar, if the term "standard milk bottles" considered out of its context is a general expression, the circumstance that in 1935 milk had been delivered for decades in glass containers of a typical shape called "milk bottles" shows a legislative intent that the term was used in a particular sense to mean the typical container known to the City Council. This is apparent from the discussion below of the meaning of the term.

In the *Ben Alpert* case the word involved was the word "garages" used in a 1911 Illinois Statute (Ill. Rev. Stats. 1937, par 65.81, p. 353) that gave the city power:

> "To direct the location and regulate the use and construction of breweries, distilleries, livery, boarding or sale stables, blacksmith shops, foundries, machine shops, garages, laundries, and bathing beaches within the limits of the city or village."

The question presented was whether or not an open-air parking space or, what was commonly known, as the court said, as "an open-air garage," was within the grant of regulatory power. What the statute did was to authorize the regulation of the *businesses* mentioned in the statute. The

purpose of the statute was not to provide for regulation of structures or premises wherein the businesses were carried on, but of the businesses themselves. In other words, in using the word "garages" in the 1911 statute the legislature did not mean a particular type of structure or particular premises then used as garages, but the garage business as it then existed or as it might exist in the future, whether carried on inside or outside of a structure. In the *Ben Alpert* case the court followed the rule of the *Barret* case —it considered "what the words used therein meant to those using them." The legislature used "garages" in a broad sense. The Chicago City Council, in using the words "standard milk bottles," did not have a similar intention. Obviously there would be no point in an ordinance imposing sanitary requirements to say that whatever has any widespread use in the future may be permitted. Moreover, the evidence in this case shows that paper milk containers had not come to be known as "milk bottles" at the time of the trial. It was an admitted fact in the *Ben Alpert* case that the word "garages" at the time of the trial included open-air parking spaces in common acceptation.

* * * * * *

The pertinent language in the Chicago ordinance about the delivery of milk is as follows:

> "Any milk or milk products sold in quantities of less than one gallon shall be delivered in *standard milk bottles;* * * *" (from third sentence of Sec. 3094 of the Revised Chicago Code; R. 108; italics supplied).

The petitioners contend that the Chicago City Council, in using the term "standard milk bottles," did not intend to permit the delivery of milk in paper containers such as the respondent's Pure-Pak cartons. The intention of the City Council was to permit the delivery of milk in quantities of

less than one gallon only in glass containers of the kind described to everyone by the words "milk bottle." As between two glass milk bottles of only slightly different shapes and thicknesses, it may be difficult to decide whether one or the other is a "standard" milk bottle. But there is no difficulty in determining that a paper milk container is neither a standard milk bottle, nor a milk bottle, nor even a bottle.

"Standard Milk Bottles" as a Term of Common Usage.

The ordinance was passed by the City Council on January 4, 1935 (R. 23). At that time (and it is also true at the present time) the use of paper containers for delivering milk was a comparatively recent development. The development began in 1928, and paper milk containers were "rather widely used" in about 1936 (R. 152). In 1938 their use was concentrated in eastern states, with scattering uses elsewhere (see Paper Milk Bottle Map, 1938, R. 1479). For many decades before the passage of the ordinance, milk had been delivered in Chicago in less than gallon quantities in the familiar glass milk bottles, and this was generally true throughout the country.

> (For a photograph of glass milk bottles, some of which are of the shape used in Chicago, see plaintiff's exhibit 14, R. 1495; also see plaintiff's physical exhibits 26 and 27 for quart and pint glass milk bottles R. 277.)

In the common speech of 1935 (and of today), the two words "milk bottle" convey a clear idea of a container of characteristic material and shape, both of which have been determined by the function of the milk bottle as a receptacle for carrying and storing a staple, easily contaminated liquid. The glass material gives the milk bottle an impervious surface which does not absorb the milk and

which is easily cleaned. The cylindrical shape of the bottle, the sloping shoulders, and an adequate mouth make for easy cleaning, but the neck is narrow enough to permit the hand to get a good grip in pouring. So widespread has been the use of the words "milk bottle," as descriptive of this container, that there is no need to resort to lexicons to determine their meaning. Everyone knows how the term is now used and has been used for decades. Everyone—even a three-year old child—would have no difficulty in selecting a milk bottle from an array of different kinds of bottles—beer, medicine, whiskey, wine, and milk.

The history and wide use of this bottle explain the prevalence of the generic term "milk bottle" in common speech. It was in 1884 that the glass milk bottle, similar in shape to those in evidence in this case, was invented by a Dr. Thatcher and placed on the market. This is pointed out in an article, "Few Changes Made in Milk Bottles Since First Marketed in 1884," *The Milk Dealer* (Olsen Publ. Co., Milwaukee), November, 1935, vol. 25, p. 56, where it is also said:

> "An interesting thing noted by all who examine one of the first milk bottles, proudly preserved, is the very small changes that have been made in the form of the bottle in half a century. The glass top and awkward bail have given way to the cardboard or paper cap, metal cap, and hood cap, and the neck has been made more graceful. Some bottles display knobs or flutings to aid in handling or to obtain individual appearance. At least one type of bottle has a neck shaped to make more simple the extraction of the cream but, on the whole, the bottle of today is faithful to the form adopted by Doctor Thatcher."

The United States Biennial Census of Manufacturers, 1935, indicates that milk bottles have constituted a distinct class of bottles and have been produced in great numbers. The

Census divided glass products into three classifications, one of which was glass containers, and milk bottles were listed as one of the classes of glass containers. The Census stated the 1935 production to be 2,123,873 gross of bottles having a value of $10,980,124.

The use of the adjective "standard" before the words "milk bottle" does not expand but merely emphasizes the common meaning of the latter words. Again, everyone is familiar with the word "standard" as descriptive of what is recognized as a familiar type or criterion. In using the word "standard" the City Council thus stressed its intention to describe the milk bottle with which everyone is familiar—that is, made of glass and having the characteristic shape; and certainly not made of paper.

Illustrative of this meaning of the words "standard milk bottles," are many uses (all furnished by the respondent) of the words "bottles," "milk bottles," and "standard milk bottles" in the record in a sense excluding paper containers:

(a) The respondent's witness Tracy, who operates a commercial dairy at the University of Illinois, was questioned about the meaning of the words "standard milk bottle" (R. 499-501). In answer to questions of the master, he said at one point, "The only standard milk bottle is the one that is the standard glass milk bottle, that I know of" (R. 499) and, when asked what was meant by "standard milk bottle" in Chicago, if paper containers were not used there, he replied, "I would expect them to mean a glass bottle" (R. 500).

(b) The respondent's witness Orvis, health officer of Winnetka, Illinois, when asked by respondent's counsel if he knew "*in the trade or in your profession* of anything *commonly* known as a standard milk bottle," replied,

"Standard milk bottle is a *glass* container of specified content and certain labeling" (R. 574; italics supplied).

(c) The respondent's witness Woodman, for many years a health officer in Evanston, where paper containers had been used for several months at the time of his testimony, used the word "bottle" several times to differentiate a glass milk container from a paper milk container (R. 675, 679, 681), with the result that respondent's counsel corrected him (R. 679, 681).

(d) The officers of the respondent itself are apparently accustomed to use the term "bottles" as excluding paper containers, or were so accustomed before the present litigation began. In the original application to the Board of Health for permission to use paper containers, Mr. S. E. Dean (President of the Dean Milk Company, of which the respondent is a wholly-owned subsidiary) wrote on January 13, 1936 that he would like to present to the Board of Health the facts about "delivering milk to the City of Chicago in paper containers *instead of bottles*" (defendants' exhibit 22, R. 1692; italics supplied).

The United States Public Health Service has construed "standard milk bottle" to exclude paper containers. The form of the June, 1939, amendment to the Health Service's model ordinance—adding "or in single-service containers" after "standard milk bottles" (defendants' exhibit 17, R. 1678)—indicates unmistakably that the original language was not believed to include paper containers. The word "bottles" was not changed, nor were the words "including paper containers" added. The use of the connective "or" shows clearly a belief that "standard milk bottles" did not include paper containers. The persistence of this meaning of "standard milk bottles" in common usage is illustrated again in the record by the language of George

D. Scott, sales manager of the manufacturer of machines for filling respondent's container. In a sales letter to the president of the Board of Health, dated August 2, 1938, he said of the Health Service's model ordinance:

> "True, its fundamental principles were written a good many years ago, and *would not include the present, more sanitary milk receptacle—because it was then unknown*" (defendant's exhibit 23; R. 1694; italics supplied).

Common usage alone thus indicates that by "standard milk bottle" the ordinance describes a glass container for milk of the familiar shape, and does not describe a paper container for milk of a novel shape. There could be no better proof of this usage than that in the record—the speech of practical men of experience in the dairy industry, as Tracy, Woodman, Orvis, Dean, and the language used by the draftsmen of milk legislation, including the Advisory Board of the United States Public Health Service.

In construing legislation, there is no need to resort to extraneous aids to construction when common usage indicates the meaning of the language used. In *Sproles* v. *Binford*, 286 U. S. 374 (1931), Mr. Chief Justice Hughes said (p. 393):

> • • • • "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. (Citing cases.) The use of common experience as a glossary is necessary to meet the practical demands of legislation • • •."

And in *Sup* v. *Cervenka*, 331 Ill. 459 (1928), the court said (pp. 461-462):

> "It is an elementary rule in the construction of a statute that the intention of the legislature must pri-

marily be determined from the language of the statute itself and not from conjectures *aliunde*. When the meaning of the language is plain and unambiguous and conveys a clear and definite meaning, there is neither necessity nor authority for resorting to statutory construction. If the words of a statute are plain and the legislative purpose manifest, that purpose must be given effect."

Definition of "Standard Milk Bottles" Derived from Lexicons.

The definitions of "bottle" and "standard" in dictionaries strongly support petitioners' contention that paper milk cartons are not included in the phrase "standard milk bottles."

The following-named dictionaries define "bottle" as indicated:

New English Dictionary (Oxford, 1888):

"1. A vessel with a narrow neck for holding liquids, now usually made of glass; originally of leather."

Encyclopedia Americana (1936), Vol. 4, p. 317:

"*Bottle*, a vessel designed to hold liquids, constructed of various materials and in various forms according to the necessities of local manufacture and the demands of the kind of liquid to be enclosed. *It is now understood to mean a vessel made of glass, with a more or less narrow neck and mouth.* In ancient times, however, the bottle was nothing more than a skin of some animal. • • • The ordinary bottle is, however, of glass. *The various bottles used for different well-known purposes are generally distinguished by peculiar shapes and sizes*, as; for example, the English wine, beer, ale and soda bottles, the French champagne, Burgundy and claret, and the Rheinish wine bottles. • • • In 1927 about four billions of bottles and jars were turned out in United States, ranging in size from small druggists' glass containers to bever-

age and *milk bottles,* fruit and pickle bottles, demijohns and carboys." (Italics supplied.)

Webster's New *International* Dictionary (2d Ed., Unabridged, 1937):

"A hollow vessel of glass, earthenware, or the like, usually with a comparatively narrow neck or mouth, and without handles. Bottles of skins of animals, as of goats sewn up in the form of a bag and tied at the neck were used by the Hebrews, and are still in use, esp. among the ruder peoples. *Bottle* is now so loosely used that its limit of application is not well defined; it is generally distinguished from such vessels as the *jug* and *demijohn.*"

Century Dictionary & Cyclopedia:

"1. A hollow mouthed vessel of glass, wood, leather, or other material, for holding and carrying liquids. Oriental nations use skins or leather for this purpose, and of the nature of these wine-skins are the bottles mentioned in Scripture: 'Put new wine into new *bottles.*' In Europe and North America glass is generally used for liquids of all kinds, but wine is still largely stored in skins in Spain and Greece. Small bottles are often called *vials.*"

Funk and Wagnall's New Standard Dictionary:

"1. A vessel for holding, carrying, and pouring liquids, having a neck and a narrow mouth that can be stopped. Specif.: (1) a glass or earthenware vessel, usually with a flat bottom to stand on, a long neck, and a mouth stopped with a cork. (2) a skin for holding wine, oil, etc.: * * * (3) Any of various receptacles serving as a bottle."

New Century Dictionary (1927):

"A vessel, now commonly made of glass, with a neck or mouth that may be closed with a stopper, for holding liquids: * * *."

Webster's New *American* Dictionary (1939):

> "1. A glass container for liquids, having a neck and no handles, and closed with a cork or stopper."

From these definitions, it is apparent that a "bottle" has certain characteristics, as the word is used today: (1) the material of which the vessel is made—glass; (2) the shape of the vessel—a relatively narrow neck and mouth. Paper containers are not made of the material—glass—of which bottles are usually made, or of a material of which bottles have ever been made in the past. And paper milk containers do not have necks.

Paper milk containers are thus excluded by the word "bottle" alone. The exclusion is even more positive when the word "milk" is added, for a paper milk container has no identity in material or shape with the glass vessel used for delivering milk. Under its definition of "milk," Funk and Wagnall's New Standard Dictionary notes: " 'Milk' is the first element in some of self-explanatory compounds; as milk-bottle, milk-can, etc." If paper containers are construed to be bottles, tin cans are bottles, beer cans (for example) are beer bottles, and milk cans are milk bottles.

The dictionary definitions of the word "standard" indicate that, as used in "standard milk bottles," it merely limits the two other words to the meaning of milk bottles of the familiar type. In Webster's New International Dictionary (2nd Ed., Unabridged, 1937), the adjective "standard" is defined in terms of the same word used as a noun:

> "1. Being, affording, or according with, a standard for comparison and judgment * * *."

And the noun "standard" is given the following definitions (among others):

Webster's New International Dictionary (2d Ed., Unabridged, 1937):

> "5. That which is established by authority, custom, or general consent, as a model or example; criterion; test; in general, a definite level, degree, material, character, quality, or the like, viewed as that which is proper and adequate for a given purpose."

Funk and Wagnall's New Standard Dictionary:

> "Having the accuracy or authority of a standard; serving as a gauge, test, guide, or model; hence of a very high or excellent kind or type, as, *standard* scales; a *standard* book.
>
> 1. Any measure of extent, quantity, quality, or value established by law or by general usage and consent; a weight, vessel, instrument, or device sanctioned or used as a definite unit, as of value, dimension, time, or quality, by reference to which other measuring-instruments may be constructed and tested or regulated.
>
> 2. Hence, any type, model, example or authority with which comparison may be made; any fact, thing or circumstance forming a basis for adjustment and regulation; a criterion of excellence; test; as, a *standard* of conduct; a *standard* of test."

The Century Dictionary (1889):

> "3. That which is set up as a unit of reference; a form, type, example, instance, or combination of conditions accepted as correct and perfect, and hence as a basis of comparison; a criterion established by custom, public opinion, or general consent; a model."

In the New English Dictionary (Oxford, 1919) Vol. IX, Part I, p. 816, the adjective "standard" is given the following definition:

> "B.I. i. b. Having the prescribed or normal size, amount, degree of quality," etc.

Thus the adjective "standard" may have a definite meaning: that which is established by custom or general

consent as a model or example or having the normal size or degree of quality. In other words, it means "of the normal, the ordinary, the well-recognized kind." It would perhaps have been sufficient for the ordinance to say simply, "milk shall be delivered in milk bottles," but this requirement was made more certain by the addition of the word "standard," indicating with greater precision that what was meant was the ordinary milk bottle, known everywhere and by everyone as such. Obviously, paper containers do not comply with this standard.

The dictionaries thus confirm the common understanding that the term "standard milk bottles" does not include paper containers. The opposite result can be reached only by a violent misconstruction of language.

Apparently there is but one instance other than in this case where a judicial construction of "standard milk bottle" was sought. In *Uservo, Inc.* v. *Selking*, 217 Ind. 567, 28 N. E. 2d 61 (1940), discussed by the respondent (brief, p. 110), an injunction decree provided that, in the exchange of milk bottles between a bottle dealer and a dairy, the dealer might make up an excess "by delivering standard bottles in good usable shape." A controversy developed about the bottles delivered, the dairy contending that the bottle dealer delivered bottles not standard in that the necks and cap seats were slightly larger than the bottles it had been using. In holding the decree unenforceable because the term "standard bottles" was indefinite, the court said (28 N. E. 2d 63):

> "It will be noted that the phrase 'standard bottle' is not defined in the order. There seems to be no universal or well defined meaning of what does or does not constitute a standard milk bottle. It was contended with much vigor in this case, that what might be a standard bottle in one city in Indiana might not be regarded a standard bottle in another."

There it was obviously difficult to tell, as between glass bottles with slight variations in the neck and cap seat, whether one or the other was a "standard" milk bottle. On the other hand, in the instant case, it is easy to tell that respondent's paper container is not a "standard milk bottle." As to the issues in the instant case, the phrase "standard milk bottle" is not indefinite. Indeed, the *Uservo* case, by illustrating the difficulties in applying the term "standard" to bottles slightly dissimilar, emphasizes the great dissimilarity between respondent's paper container and a standard milk bottle.

Petitioners' contention that the term "standard milk bottles" in the 1935 ordinance does not include paper containers is not based on the ground that paper containers were then unknown to the City Council. The ground is that the City Council in using the term intended to use it in the sense in which it was usually used at that time; and one element in that sense is that the material of standard milk bottles is glass, the result being that paper containers are excluded by the term. This is true even though the existence of paper containers may then have been known to the City Council.

Outstanding in respondent's argument on the construction of the ordinance are two related defects. *There is no discussion whatever of the meaning of "milk bottles" as a separate term.* Also respondent's brief misses the point that we are here seeking the intention of the Chicago City Council in the year 1935 in using the words "standard milk bottles."

In using "bottles" the City Council did not intend to permit the use of a container made of any kind of material that has ever been used or that might possibly be used in a thing termed "bottle," as the trial court in effect held.

The intention must be sought from the sense in which the word is *usually used*, not from the sense in which it might possibly have been used in the past or might possibly be used now. Obviously the City Council is likely to have used the word in the sense in which it was usually used in 1935. All dictionaries, as shown above, say that bottles are usually made of glass and have a narrow neck. Added to this are the facts (a) that the purpose of the ordinance was to fix the kind of container to be used for carrying and storing milk, a purpose for which glass with its impervious surface is peculiarly suited and (b) that the prior practice for decades had been to use glass containers for this purpose. The inevitable conclusion is that the City Council in using the word "bottles" meant glass containers.

But there is an even more serious defect in respondent's argument. The City Council did not use the word "bottles" alone. It used the compound term "milk bottles." In the common usage of the household as well as of the dairy industry, "milk bottle" means a glass container with a characteristic shape. The broad word "bottle"—describing what is and has been *usually* made of glass—is greatly narrowed by putting the word "milk" before it to make the compound term "milk bottle"—describing what has *always* been made of glass. Since the common usage of 1935 and of today attributes a fixed meaning to "milk bottles" (one of the elements being that the material of which they are made is glass), it is clear that the City Council did not intend to include paper containers in requiring milk to be delivered in milk bottles.

The respondent's entire approach to this issue is based on an erroneous conception of the method of interpreting language. Its argument not only disregards the importance of common usage, stressed in the cases cited above, but also disregards the necessity of looking to the circum-

stances surrounding the enactment of the ordinance to determine *the meaning of the words used to the persons using them.* For example, the respondent says (brief, p. 112):

> "We therefore respectfully submit that the question in this case is not what was meant by a 'standard milk bottle' precisely at the time the ordinance was adopted, but what is meant by 'standard milk bottle' at the time the ordinance is being enforced."

The result of respondent's argument on this branch of the case is that "standard milk bottles" means the same thing as "standard milk containers." Section 3094 of the ordinance shows that this is wrong. The complete text of the section is as follows:

> "The sale of dipped milk and milk products is hereby expressly prohibited. All pasteurized milk and milk products shall be placed in their *final delivery containers* in the plant in which they are pasteurized, and all certified milk and milk products sold for consumption in the raw state shall be placed in their *final delivery containers* at the farm at which they are produced. Any milk or milk products sold in quantities of less than one gallon shall be delivered in *standard milk bottles;* provided, however, that nothing herein contained shall be construed to prohibit hotels, soda fountains, restaurants, and similar establishments from dispensing milk or milk products from sanitary dispensers approved by the board of health.
>
> "The delivery of milk and milk products to, and the collection of milk and milk products *containers* from, quarantined residences shall be subject to the rules and regulations of the board of health.
>
> "No milk *bottle* or other *containers* may be taken out of or away from quarantined premises during the period of quarantine or thereafter, until said *bottles* or *containers* have been sterilized, and permission has been granted by the board of health for the removal of same." (R. 108-9; italics added.)

The second sentence contains two uses of the words "final delivery containers," a broad term including receptacles of

any kind of material; and "containers" is also used elsewhere in the section. In the third sentence—the provision of the ordinance involved in this case—the containers to be used for the small quantities of milk usually delivered to homes were described by the narrower term "standard milk bottles.". If the City Council had intended "standard milk bottles" to mean the same thing as "standard milk containers," it would have continued to use the word "containers" in the third sentence as it did in the second sentence and elsewhere, instead of changing to the narrow word "bottles."

An example of the use of "bottles" in a sense excluding paper containers is found in the respondent's brief (p. 28), where item 18 of section 15 of the Illinois Milk Pasteurization Act of 1939 (ch. 56½, secs. 115-134, Ill. Rev. Stat. 1941) is quoted:

> "Item 18. *Bottling or packaging* of milk and milk products shall be done at the place of pasteurization by approved mechanical equipment." (Italics added.)

"Milk Products" are defined in section 1 (b) of the act to include only beverages. The phrase "Bottling or packaging" in item 18 of section 15 thus makes a distinction between glass and paper receptacles, the word "bottling" having reference to glass and the word "packaging" to paper containers. If "bottling" properly referred to paper containers, there was no need to use the word "packaging."

We point out here also that the respondent's container is not a "standard milk bottle" even if the broad meaning of the term constructed by the trial court were followed, i. e., even if paper containers in general may be within the meaning of the words "milk bottles." For the evidence shows that the respondent's container is not a "standard" container as the trial court interpreted the term. As to the paraffin bath used at the respondent's Chemung plant

in forming paper containers, the respondent's witnesses gave the temperature as from 170° to 172° (R. 711, 807, 904). And at the respondent's plant the container is in the paraffin compartment for only 19 seconds according to one of the witnesses (R. 904), and for 28 seconds, remaining submerged for 12 or 8 seconds, according to another of the witnesses (R. 806). These practices fall short of the requirements of the United States Public Health Service, which says that all paper containers shall be treated with paraffin "for at least thirty seconds at at least 180° F." (R. 1704). The respondent's container may not be said to be "standard" under its own definition of "standard" when it is not made in the manner required by the U. S. Public Health Service.

Conclusion.

The petitioners respectfully urge this court to reverse the judgment of the Circuit Court of Appeals.

CITY OF CHICAGO, a Municipal Corporation,
BOARD OF HEALTH OF THE CITY OF CHICAGO,
DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,

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